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No. 85-799

In the Supreme Court of the United States

OCTOBER TERM, 1985

DALE A. MONROE, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner challenges his removal from the Bureau of Alcohol, Tobacco and Firearms for falsifying records concerning his contacts with a potential informant and the number of hours he worked.

1. a. In 1982, the Bureau of Alcohol, Tobacco and Firearms removed petitioner from his position as a criminal investigator, on the grounds that he had made false or misleading entries on official documents concerning his contact with a potential informant and the hours he worked. Prior to his removal, petitioner was afforded the opportunity to make an oral and a written reply to the charges against him, and he made both. At the time of petitioner's oral reply, the official who heard it possessed authority to make a decision or recommendation regarding the proposed removal. Before doing so, however, the official was transferred to another position. The original

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official provided the new official who was to decide the matter with a detailed synopsis recounting petitioner's oral reply. After reviewing the synopsis and petitioner's response setting forth his disagreements with it, the new official decided to remove petitioner. Pet. App. A1-A4.

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB or Board). On the day before the presiding official's hearing of the matter, the attorney responsible for presenting the agency's case and the new official interviewed one of the agency employees (who was several levels removed from the latter) designated by petitioner as a witness (Pet. App. A5).

b. The presiding official of the MSPB issued a detailed decision, finding that the relevant charges against petitioner were supported by the evidence,[1] that the agency did not commit harmful procedural error in effecting petitioner's removal, and that the penalty of removal was appropriate. The Board denied petitioner's petition for review, finding that petitioner had "failed to show harmful error" regarding the agency's transfer of the original official, because the summary of the oral reply and petitioner's written reply were considered by the new official and petitioner "ha[d] presented nothing to suggest" that a recommendation by the original official would have been favorable or that it would have affected the deciding official's action (Pet. App. B1).

c. The court of appeals affirmed (Pet. App. A1-A7), finding no harmful error in the removal process. It noted first that the relevant regulation, 5 C.F.R. 752.404(c)(2), requires only that the official hearing the oral reply have the

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[1]The presiding official found that one of the agency's ten specifications supporting removal was insufficiently supported by the evidence; that specification—charging petitioner with making false or misleading entries on one report—is not relevant to the instant petition.

authority to make or recommend a final decision, not that he actually do so. It further noted that all information and arguments proffered by petitioner in the course of his oral reply were before the deciding official prior to his decision; thus, assuming arguendo that there was a procedural error, petitioner had still failed to demonstrate that it could have had any effect on the agency's decision to dismiss him (Pet. App. A2-A5). The court also held that the interview of a witness by the agency attorney and new official did not constitute a forbidden ex parte contact, since it did not involve contact with a deciding official prior to his decision and was not prohibited by statute or regulation, and that it was not shown to have been prejudicial (*id.* at A5-A6). Finally, the court found that the Board decision was supported by substantial evidence (*id.* at A6-A7).

2. The sequence of events in this case is obviously unusual, and even if there were procedural error in either of the respects petitioner claims, he has failed to demonstrate any harm arising from it. Petitioner does not assert a conflict between the factbound decision of the court of appeals in this case and any decision of this Court or any other court of appeals; indeed, he cites no cases from any other court. In any event, there was no error.

a. Petitioner's argument that it was improper for the agency to remove petitioner from his position in the absence of a recommendation from the official who heard his oral reply is defective in two respects. First, it fails to identify any regulatory or statutory protection of which petitioner was deprived. The pertinent regulation provides that the oral reply must be heard by an official having authority to make or recommend a final decision on the proposed adverse action. 5 C.F.R. 752.404(c)(2). As the court of appeals correctly noted, it is not disputed that the official who heard the oral reply possessed such authority at the time he heard

it (Pet. App. A3-A4). Thus, petitioner received the procedural protections to which he was entitled. See *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12 (1979); see also *Swindell* v. *Veterans Administration*, 12 M.S.P.R. 148, 150 (1982) (presiding official "found that the oral reply official has the option of declining to make a recommendation" at all).[2]

Second, petitioner is unable to advance a credible statement of how this alleged error was harmful. The court of appeals pointed out that "all of the information and arguments that [petitioner] made in the course of his oral reply were before the deciding official" (Pet. App. A4); at his hearing, petitioner "was required by the presided [*sic*] official to detail all of his objections to the written summary of his oral response that had been prepared by [the original

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[2]Petitioner seems to contend that, even if the letter of 5 C.F.R. 752.404(c)(2) was satisfied, its spirit was not, since no recommendation was made. He is incorrect, however, in saying that without a recommendation "there would be no point in exercising the oral reply procedure" (Pet. 6). As the Court of Claims explained in *Ricucci* v. *United States*, 425 F.2d 1252 (1970), the purpose of an oral reply is to provide a colloquy between the employee and someone who has the expertise to make the colloquy meaningful and the status to encourage it. This ensures that the colloquy will reveal to the employee "how his presentation is going, what is making an impression and what is not, what needs clarification or substantiation, and what had best simply be dropped." *Id.* at 1254. It is undisputed here that such a colloquy took place. While the purpose of it may have been thwarted somewhat by petitioner—who relied most heavily on his written response—when he refused to answer specific questions because he did not want to be "caught, as he put it, 'in a contradiction,' " that is attributable to petitioner, not to the procedure utilized by the agency (Pet. App. A4). The oral reply officer had the expertise and the status to satisfy the spirit as well as the letter of 5 C.F.R. 752.404(c)(2). The only other possible reason to require an actual recommendation would be if there was some danger of losing demeanor evidence, but petitioner has not made that claim in this case.

official]" (*id.* at A2).[3] The court of appeals concluded that it could not "understand what in [petitioner's] case [the original official] could have considered that was not also before [the new official]" (*id.* at A4).[4]

b. Petitioner's argument that the agency's interview of an employee designated as a witness for petitioner constituted improper ex parte contact is similarly unavailing. As the court of appeals correctly pointed out (Pet. App. A6), there is no statutory or regulatory authority to support petitioner's novel assertion that counsel may not interview non-party witnesses privately. This is not surprising. The American Bar Association Committee on Professional Ethics and Grievances stated over 50 years ago that an attorney "must ascertain the truth and bring it out in the trial and to that end may properly interview witnesses subpoenaed by the other side, if no deception is practised by him, in order that justice may be done." Formal Op. 127 (1935); see also Formal Op. 117 (1934); Formal Op. 14 (1929); Informal Op. 892 (1965); cf. Model Rules of Professional Conduct 3.4(a) and (b) (1983).

An interview with a witness simply cannot be successfully analogized to ex parte contact with a decisionmaker. Ex parte communications with a decisionmaker acting in a quasi-judicial capacity are improper because they can provide the decisionmaker with information or arguments to which the other party may not have an opportunity to

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[3]Indeed, petitioner apparently acknowledged that at his MSPB hearing he corrected all the alleged inaccuracies in the synopsis of his oral response (Tr. 576). In any event, the presiding official concluded that these alleged inaccuracies were "minor" and rejected petitioner's assertion of harmful error (Presiding Official's Decision 11-12 (No. CH07528310112 (Dec. 13, 1983)).

[4]The court of appeals applied the harmless error standard petitioner himself urges (compare Pet. 7-8 with Pet. App. A4), so petitioner's challenge to the court's decision is necessarily fact-specific.

respond. Contact with a witness is far different. His participation is limited to recounting his knowledge of the relevant facts. It is essential for an attorney to know the information possessed by the witness in order to represent his or her client properly. As noted above, such information gathering is encouraged, rather than prohibited. Finally, opposing counsel can (and, in this case, did) cross-examine or otherwise respond to the witness (see Pet. App. A6). We note that if one were to adopt petitioner's approach, a party could halt the fact-finding process simply by listing all knowledgeable individuals as witnesses.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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[5]As the court of appeals pointed out (Pet. App. A6), even if the pre-hearing contact was improper, it was harmless error. We note in this regard that, contrary to petitioner's assertions (Pet. 8), there was no inconsistency between the witness's earlier written statement and the testimony he gave at the hearing. Tr. 269-270.